

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARRIUS MARTICE MCCRARY,

Defendant-Appellant.

UNPUBLISHED

June 13, 2013

No. 308237

Oakland Circuit Court

LC No. 2011-237893-FC

Before: M. J. KELLY, P.J., and MURRAY and BOONSTRA, JJ.

PER CURIAM.

Defendant Darrius Martice McCrary appeals by right his jury convictions of first-degree murder (under two theories: premeditated murder and felony murder), MCL 750.316, first-degree home invasion, MCL 750.110a, and possession of a firearm during the commission of a felony (felony-firearm) (three counts), MCL 750.227b.¹ The trial court sentenced McCrary to serve life in prison without the possibility of parole for the first-degree murder conviction, to serve 7 to 20 years in prison for the first-degree home invasion conviction, and to serve two years' in prison for each felony-firearm conviction. We conclude there were no errors warranting a new trial. However, we agree that McCrary was improperly convicted of a third count of felony-firearm. For these reasons we affirm in part and vacate in part.

McCrary first argues that the trial court erred by denying his request for a voluntary manslaughter instruction. This Court reviews claims of instructional error de novo. *People v Kowalski*, 489 Mich 488, 501; 803 NW2d 200 (2011). This Court reviews the jury instructions as a whole to determine whether the instructions fairly presented the issues for trial and sufficiently protected the defendant's rights. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000).

"[A] requested instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." *People v Cornell*,

¹ The jury acquitted McCrary of assault with intent to murder, MCL 750.83, and an additional count of felony-firearm, MCL 750.227b.

466 Mich 335, 357; 646 NW2d 127 (2002). A defendant charged with murder is entitled to an instruction on the necessarily included lesser offense of voluntary manslaughter, if supported by a rational view of the evidence. *People v Mendoza*, 468 Mich 527, 541; 664 NW2d 685 (2003). “[T]o show voluntary manslaughter, one must show that the defendant killed in the heat of passion, the passion was caused by adequate provocation, and there was not a lapse of time during which a reasonable person could control his passions.” *Id.* at 535. Whether there was sufficient provocation is measured under a reasonable person standard. *People v Sullivan*, 231 Mich App 510, 519; 586 NW2d 578 (1998). Provocation is adequate only if it is so severe or extreme as to provoke a reasonable person to commit the act. *Id.*

McCrary asserts that there was evidence that he killed his ex-girlfriend, Fredericka Dixon, in the heat of passion brought on by adequate provocation. He points to evidence that just prior to the shooting he had still been in contact with her, even though the two had broken up. He also cites the evidence that he spent nights at Dixon’s home as evidence that there was still “something” romantic going on between them. McCrary contends that, in addition to this evidence, the evidence that in July or August 2010 he walked into Dixon’s home (unannounced) and then out of the home and sent her a text message stating, “he’s on my side of the bed,” referring to the new man she was dating, was adequate to establish provocation. There was also evidence that, just days before the shooting, McCrary threatened to kill Dixon, apparently because she was dating another man.

This evidence was insufficient to establish adequate provocation. To the contrary, there is nothing about this evidence that suggests circumstances where a reasonable person would be moved to homicidal rage. In any event, the evidence established that McCrary knew about Dixon’s new boyfriend for some time and that he had ample opportunity reflect on the situation. See *Mendoza*, 468 Mich at 535; *Sullivan*, 231 Mich App at 519. Thus, even if Dixon’s decision to date another man could be deemed an on-going provocation, there was sufficient time for a reasonable person to cool off. Furthermore, there was no evidence that McCrary was provoked just before he killed Dixon.

On November 25, 2010, Thanksgiving Day, around 8:00 p.m., Dixon and her son were home alone. Her son went upstairs and played video games. At some point he went to the kitchen to warm some food. While in the kitchen, Dixon’s son heard a “jingle” on the door, like someone was trying to open it. He looked through the peephole and saw McCrary on the porch; he was talking on his phone. Dixon’s son checked to see if the door was locked and it was. He yelled downstairs to his mother and told her that McCrary was outside. He said his mother told him to lock the door. He continued to warm up his food and went back upstairs. A few minutes later, he went downstairs to retrieve his food and saw McCrary pacing out front while apparently trying to call someone. Dixon’s son said his mother came up from downstairs at that point with a phone in her hand and walked into the living room. He then heard a bang, a loud noise like someone kicked in the door. He was very startled. When he left the kitchen he saw his mother running. McCrary was standing with a gun near the front door and shot Dixon three times.

Even assuming that McCrary was deeply upset with Dixon, this evidence does not permit an inference that he was adequately provoked at the time of the shooting. The evidence shows that McCrary came to Dixon’s house and was apparently armed before he came. He paced in front of the home and tried to let himself in. Refusing to let someone in is not the kind of act that

is so severe or extreme as to provoke a reasonable man to kill. See *Sullivan*, 231 Mich App at 519. And even if the evidence was sufficient to provoke a reasonable man—and it was not—any error would not warrant relief. McCrary was convicted of first-degree premeditated murder even though the trial court instructed the jury on the lesser included offense of second-degree murder. As such, even if McCrary were entitled to a voluntary manslaughter instruction, the trial court’s failure to instruct on voluntary manslaughter would be harmless. See *People v Gillis*, 474 Mich 105, 140 n 18; 712 NW2d 419 (2006).

Next, McCrary argues that the prosecutor erred by asserting in rebuttal that McCrary had not presented a defense, which—he claims—improperly shifted the burden of proof and improperly pointed out that McCrary did not testify on his own behalf. This Court reviews unpreserved claims that a prosecutor erred for plain error affecting substantial rights. *People v Fyda*, 288 Mich App 446, 460-461; 793 NW2d 712 (2010).

Before addressing this claim of error, we would like to briefly acknowledge the prosecutor’s contention that it is a misnomer to label claims such as this one as claims of “prosecutorial misconduct.” Although we recognize that the phrase prosecutorial misconduct has become a term of art in criminal appeals,² we agree that the term “misconduct” is more appropriately applied to those extreme—and thankfully rare—instances where a prosecutor’s conduct actually violates the rules of professional conduct. See, e.g., MRPC 8.4. In the vast majority of cases, the conduct about which a defendant complains is premised on the contention that the prosecutor made a technical or inadvertent error at trial—which is not the kind of conduct that would warrant discipline under our code of professional conduct. Therefore, we agree that these claims of error might be better and more fairly presented as claims of “prosecutorial error,” with only the most extreme cases rising to the level of “prosecutorial misconduct.”

“[A] prosecutor may not argue facts not in evidence or mischaracterize the evidence presented” *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001). However, the prosecution is free to argue the evidence and all reasonable inferences arising from it as they relate to the prosecution’s theory of the case. *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007). Attacking the defense theory does not shift the burden of proof and commenting on the weaknesses of the defendant’s case is not error. *People v McGhee*, 268 Mich App 600, 635; 709 NW2d 595 (2005). Also, “[a] prosecutor may fairly respond to an issue raised by the defendant.” *People v Brown*, 279 Mich App 116, 135; 755 NW2d 664 (2008).

² We note that our Supreme Court began using this phrase by at least the 1970s. See, e.g., *People v Hammond*, 394 Mich 627, 630; 232 NW2d 174 (1975). In its earlier decisions, our Supreme Court appears to have addressed these claims as claims that there was error warranting reversal and not as prosecutorial misconduct. See, e.g., *People v Allen*, 351 Mich 535, 544, ; 88 NW2d 433 (1958) (reviewing the “ground of error” premised on the prosecutor’s admittedly “intemperate and perhaps better left unsaid” remarks).

Here, the prosecutor noted in rebuttal that McCrary had not presented any evidence to contradict the prosecution's evidence on the elements of the crimes: "There is nothing that has been shown to you through defense witnesses or in any regard that disproves any of the elements of the charges. Nothing has been shown to you that negates his intent." These statements, McCrary contends, improperly pointed out to the jury that McCrary did not testify on his own behalf.

McCrary's lawyer argued in his closing argument that the evidence presented failed to show that McCrary had malicious intent; he also argued that there was evidence that McCrary and Dixon were on the phone right before the incident and that he acted on impulse. It appears from the context that the prosecutor was merely responding to McCrary's lawyer's argument about McCrary's intent. *Brown*, 279 Mich App at 135. Furthermore, the prosecution's attack on the weaknesses of the defense's case, which was that McCrary did not have the requisite intent for first-degree premeditated murder, did not shift the burden of proof. *McGhee*, 268 Mich App at 635. Thus, the prosecutor's remarks were not improper.

Lastly, McCrary argues that his judgment of sentence improperly reflects two convictions and sentences for first-degree murder and improperly reflects sentences for two counts of felony-firearm premised on a single murder. This Court reviews an unpreserved claim that his double jeopardy rights have been violated for plain error. *People v McGee*, 280 Mich App 680, 682; 761 NW2d 743 (2008).

When a defendant who has committed a felony and a concurrent single homicide is charged with, and convicted of, first-degree premeditated murder, first-degree felony-murder, and the felony underlying the felony-murder charge, to avoid double-jeopardy implications, the defendant should receive one conviction for first-degree murder, supported by two theories. *People v Williams*, 475 Mich 101, 103; 715 NW2d 24 (2006). McCrary's amended judgment of sentence properly reflects his conviction of first-degree murder premised on two theories with one life sentence. *Id.*

With some exceptions, the felony-firearm statute, MCL 750.227b, provides for an additional felony charge and sentence whenever a person possessing a firearm commits a felony. *People v Calloway*, 469 Mich 448, 452; 671 NW2d 733 (2003). McCrary argues—and the prosecution concedes—that one felony-firearm conviction and sentence should be vacated because the jury found him guilty of felony-firearm under both murder theories. Because McCrary could only be convicted of one first-degree murder charge, albeit under two theories, he should only receive one felony-firearm conviction and sentence premised on that conviction. See *id.* Therefore, we vacate one of McCrary's felony-firearm convictions premised on his first-degree murder conviction.

Affirmed in part, vacated in part, and remanded for amendment of the judgment of sentence in accord with this opinion. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ Christopher M. Murray
/s/ Mark T. Boonstra